

The Hon. Tana Lin

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

**UNITED STATES OF AMERICA,**

No. CR22-212TL

**Plaintiff,**

V.

## ROBBY LEE ROBINSON.

## GOVERNMENT'S TRIAL BRIEF

## Defendants

The United States of America, by and through Tessa M. Gorman, Acting United States Attorney for the Western District of Washington, and Stephen Hobbs and Rachel Yemini, Assistant United States Attorneys, respectfully submits this trial brief in the above-captioned case.

## I. INTRODUCTION

Defendant Robby Lee Robinson is charged in the Second Superseding Indictment with the following count under this cause number:

Count 1: *Possession of Firearms or Ammunition by a Felon*, in violation of Title 18, United States Code, Section 922(g)(1).

Trial is scheduled to begin on October 2, 2023. The government expects to call 5 to 9 witnesses and introduce approximately 20 to 40 exhibits. The government anticipates that it can present its case-in-chief in approximately two days, including voir dire, opening

1 statement, and closing argument. However, as previously communicated to the Court, one  
 2 government witness will not be available until the morning of Wednesday, October 4,  
 3 2023. Accordingly, the government expects to rest after the testimony of that witness.

4 The government is filing this trial memorandum in order to advise the Court and the  
 5 defense of the scope of the government's case. The government reserves the right to amend  
 6 any of these pleadings and specifically to call additional witnesses and present additional  
 7 exhibits at trial.

## 8 II. FACTUAL BACKGROUND

9 On November 8, 2022, at approximately 10:20 pm, 911 dispatch received a call  
 10 from David Williams reporting that he was driving on State Route 18 toward Tacoma, he  
 11 had just gotten into a car accident, and the person with whom he had collided was shooting  
 12 at him. Williams said he had bullet holes in his car and was driving about 100 miles per  
 13 hour to get away from the shooter, who was driving a white Chevy Malibu. On the  
 14 recording, the sounds of a gunshot can be heard, and Williams then said that the shooter  
 15 was still shooting at him. Williams said he could not identify the driver, glass had shattered  
 16 in his vehicle, and the shooter had shot at him about five times. After about five minutes,  
 17 Williams said that the shooter had gotten off the freeway, and Williams then pulled over.

18 Williams had the equivalent of a dash camera recording from the start of his trip to  
 19 the end. There is no audio, but the video shows a white Chevy Malibu passing closely on  
 20 Williams' left, as the road turns to one lane and Williams continues behind the Malibu for  
 21 a few minutes. The road splits into two lanes, and shortly thereafter, Williams tries to pass  
 22 the Malibu on the left as the Malibu changes from the right to left lane. Williams continues  
 23 to try to pass on the left, and the cars collide. Immediately after the collision, the Malibu  
 24 speeds up ahead of Williams and moves into the right lane, as Williams continues to drive  
 25 in the left lane. After about 25 seconds, the Malibu slows down, and as Williams passes it,  
 26 two flashes—gunshots—come from the Malibu's driver-side window. The video then  
 27 shows Williams driving at high speed for several minutes until finally pulling over.

1 Washington State Patrol (WSP) troopers responded to the call by going to Williams,  
 2 who was stopped on the side of the freeway. They took photographs showing damage to  
 3 the exterior of his car consistent with the sideswipe, as well as what appeared to be a  
 4 gunshot that had shattered the rear passenger-side window. Investigators also took  
 5 photographs of what they believed were bullet fragments. Williams told officers that he  
 6 had a dashcam, and they retrieved the video. Williams spoke with different officers at the  
 7 scene, providing a statement largely consistent with the 911 call. Williams also stated that  
 8 he did not get a good look at the shooter.

9 While WSP met with Williams, King County Sheriff's (KCSO) deputies responded  
 10 to the 911 call by going to the exit where the Malibu had exited the freeway. A KCSO  
 11 deputy was stationed at that exit, and KCSO officers began following the Malibu soon after  
 12 it left the freeway. Deputies followed the Malibu for a short time and then turned on their  
 13 lights. The vehicle did not immediately pull over and continued to drive to the Burger King  
 14 (where Robinson's wife worked). Defendant Robby Lee Robinson then stopped the car and  
 15 got out of the driver side. He was the only individual in the vehicle. The outside of the  
 16 vehicle did show marks on the driver side of the vehicle consistent with the description of  
 17 the accident.

18 As seen in a recorded video, Robinson was placed in the back seat of a police car  
 19 and read his *Miranda* warning. Robinson then claimed that he was the victim and had been  
 20 hit by another car on the freeway. He stated that the car he was driving belonged to his  
 21 wife, and he denied knowing about a shooting or owning any guns. Robinson said he did  
 22 not know if his wife owned guns, was not aware of any guns in the car, and was not allowed  
 23 to talk to his wife about certain things because he was a felon. He admitted knowing about  
 24 his felony convictions and remembered that AUSA Stephen Hobbs prosecuted him.  
 25 Robinson said that he drives the car twice a week and had a different car. He also said he  
 26 was coming from his grandmother's house and spends four to five nights a week there.  
 27 When asked about the empty shell casings in the cupholder of the car he was driving,

1 Robinson denied knowing anything about it and said his brother does a lot of “reloading.”  
 2 Robinson also said that his phone was dead, and he could not call anyone after the car  
 3 accident.

4 Investigators impounded Robinson’s vehicle and obtained a warrant to search it.  
 5 Investigators found six empty .357 shell casings in the center console cupholder, four  
 6 empty .357 shell casings on the front passenger seat, the two handguns described in the  
 7 indictment under the front passenger seat, and live ammunition under the front passenger  
 8 seat. In all, investigators found 11 empty .357 shell casings. When investigators found the  
 9 magnum, it was unholstered and fully loaded. The Taurus .22 was holstered and fully  
 10 loaded. Investigators also found Robinson’s wallet with his identification in the footwell  
 11 of the front passenger seat, along with a ghost viper optic sight.

12 ATF agents had the guns and ammunition checked for fingerprints but found no  
 13 viable prints. An ATF interstate nexus expert also provided a nexus analysis, confirming  
 14 that the firearms and ammunition were just that and that they were manufactured outside  
 15 Washington State. A DNA analysis was conducted by the FBI and found a very strong  
 16 level of support that DNA found on both firearms belonged to Robinson.

17 The case agent also interviewed Robinson’s wife. She claimed that the guns and the  
 18 car are hers. She said that she keeps the guns under the passenger seat but brings them into  
 19 the Burger King where she works, though she forgot to do it on the relevant day. She also  
 20 confirmed that on the day of the shooting, Robinson had dropped her off at work and then  
 21 driven away in her car. She also explained that at the time of his arrest, Robinson was  
 22 driving to pick her up from work and was the only person in the car.

### 23                   **III. ELEMENTS OF THE OFFENSE**

24 Count 1 of the Second Superseding Indictment charges the Defendant with  
 25 *Possession of a Firearm or Ammunition by a Felon*, in violation of Title 18, United States  
 26 Code, Section 922(g)(1).

To convict the Defendant of this crime, the government must prove that: (1) the Defendant knowingly possessed a firearm or ammunition, (2) the firearm or ammunition had previously been transported in interstate or foreign commerce, and (3) the Defendant had been, and knew he had been, previously convicted of a crime punishable by a term of imprisonment exceeding one year. 9th Cir. Model Jury Instr. No. 14.15.

“A person has possession of something if the person knows of its presence and has physical control of it or knows of its presence and has the power and intention to control it. More than one person can be in possession of something if each knows of its presence and has the power and intention to control it.” Model Ninth Circuit Instruction 6.15.

Possession may be personal or shared, *United States v. Smith*, 962 F.2d 923, 929–30 (9th Cir. 1992), and either actual or constructive. See *United States v. Batimana*, 623 F.2d 1366, 1369 (9th Cir. 1980). Actual possession connotes physical custody or actual personal dominion.” *Id.* Constructive possession requires that the Defendant both knew of the item’s presence and had the power to exercise dominion and control over it. *Id.*; *United States v. Penagos*, 823 F.2d 346, 350–51 (9th Cir. 1987).

#### IV. LEGAL AND EVIDENTIARY ISSUES

##### A. Witnesses

The government will separately file a list of intended witnesses. The witnesses will not be listed in the order in which the government intends to call them.

##### B. Exhibits and Physical Evidence Seized

The government will separately file an amended list of exhibits. The United States will introduce at trial physical evidence seized over the course of the investigation, including two firearms. In the interest of safety, the government will not bring the ammunition found with and in the firearms into the courthouse. The government also intends to offer video and audio recordings.

//

//

1           **C. Admissibility of the Defendant's Own Statements**

2           The United States intends to introduce recorded statements made by the Defendant  
 3 after his arrest.

4           Statements by a defendant are not hearsay when offered by the government against  
 5 the speaker. Fed. R. Evid. 801(d)(2). The converse, however, is not true. An out-of-court  
 6 statement of a declarant offered by the declarant on his own behalf is inadmissible hearsay  
 7 because, among other things, it is not a statement by a party-opponent. *See United States*  
 8 *v. Ortega*, 203 F.3d 675, 682 (9th Cir. 2000); *see also Williamson v. United States*, 512 U.S.  
 9 594, 600 (1994) (the hearsay rule excludes self-exculpatory statements because such  
 10 statements “are exactly the ones which people are most likely to make even when they are  
 11 false”). The defense has not moved to suppress any of the statements.

12          The government objects to any attempt by Robinson to introduce his self-  
 13 exculpatory statements (made on April 30, 2020, after his flight from officers).

14           **D. Other Out-of-Court Statements**

15          “Hearsay is a statement, other than one made by the declarant while testifying at the  
 16 trial or hearing, offered in evidence to prove the truth of the matter asserted.” Fed. R. Evid.  
 17 801(c). The admission of hearsay into evidence is generally proscribed by Rule 802. When  
 18 it is relevant that an out-of-court statement was made, however, and the statement is offered  
 19 exclusively to prove that it was made, it is not hearsay and is therefore admissible. *See*  
 20 *Anderson v. United States*, 417 U.S. 211, 220 n.8 (1974). That is because statements not  
 21 offered for their truth are not hearsay. Fed. R. Evid. 801(c).

22          In certain instances, the government may offer out-of-court statements not to prove  
 23 the truth of the matters asserted, but merely to explain information possessed by, and the  
 24 subsequent actions of, the investigative agents, law enforcement officers, and other  
 25 witnesses. Furthermore, additional out-of-court statements provide necessary context in  
 26 order to comprehend the admissible statements of the Defendant and others. Because these  
 27 statements will not be offered for the truth of the matter asserted, the statements would not

1 constitute hearsay as defined by Rule 801(c). *See United States v. Mitchell*, 502 F.3d 931,  
 2 969 (9th Cir. 2007) (no error in allowing investigator to testify about out-of-court  
 3 statements from informant that caused him to go to certain location); *United States v.*  
 4 *Munoz*, 233 F.3d 1117, 1134 (9th Cir. 2000) (no error in allowing attorney to testify about  
 5 out-of-court conversations with Michigan State investigators that caused him to send letter  
 6 requesting that investment company sales personnel suspend investment sales); *United*  
 7 *States v. Brown*, 923 F.2d 109, 111 (8th Cir. 1991) (out-of-court statement is not hearsay  
 8 if offered for limited purpose of explaining why police investigation was undertaken).

#### 9 **E. Recalling Law Enforcement Witnesses and Interrupting Witnesses**

10 While it does not anticipate having to do so, the government requests leave to re-  
 11 call law enforcement witnesses during the course of the trial.

#### 12 **F. Admissibility of Photographs, Video, and Audio**

13 The government expects to offer a brief video taken from the victim's car and audio  
 14 recording of the victim's 911 call. The government will introduce photos taken during the  
 15 search and evidence processing. The government may offer recorded jail calls made by the  
 16 defendant. These videos, audio recordings, and photos are admissible if they accurately  
 17 depict the scene or capture the recorded event. *See United States v. Brannon*, 616 F.2d 413,  
 18 416 (9th Cir. 1980) (evidence that photographs accurately depict scene provides sufficient  
 19 foundation for admission under FRE 901(a)).

#### 20 **G. Expert Testimony**

21 The United States is prepared to call two experts – one related to DNA evidence and  
 22 the other to the interstate nexus of the firearms and ammunition – and has provided notice  
 23 to the defense of their identity and the subject matter of their testimony. Under Federal  
 24 Rule of Evidence 702, “[i]f scientific, technical, or other specialized knowledge will assist  
 25 the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified  
 26 as an expert by knowledge, skill, experience, training, or education, may testify thereto.”  
 27 Expert testimony must be both (1) relevant, that is, it must have a valid connection to the

1 pertinent inquiry at trial, and (2) reliable, that is, it must be trustworthy. *Daubert v. Merrell*  
2 *Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). Each of the government's proposed  
3 expert witnesses are experts in their respective fields, and the government submits that their  
4 testimony will meet the reliability requirements set forth in *Daubert*.

5 **H. Pre-Trial Motions and Rulings.**

6 The parties have filed, and the Court has ruled upon, several pre-trial motions (other  
7 than motions *in limine*, which are discussed below):

8 The Government filed a motion to preclude justification defense (Dkt. 39). This  
9 motion was denied by the Court (Dkt. 86).

10 The Defendant filed a motion to compel election between counts (Dkt. 46). This  
11 motion was stricken as moot by the Court (Dkt. 80).

12 The Defendant filed a motion to dismiss the charges (Dkt. 42). This motion was  
13 denied by the Court (Dkt. 81).

14 **I. Stipulations**

15 The parties have agreed to the following stipulation (Dkt. 43):

16 Prior to November 8, 2022, Robby Lee Robinson, the defendant herein, had been  
17 convicted – and knew he had been convicted – of a crime punishable by a term of  
18 imprisonment exceeding one year and thus was a “felon” as that term is defined by  
19 federal law.

20 At this time, there are no other agreed stipulations.

21 **J. Motions *in Limine***

22 The parties have agreed to, and the Court has ruled on, a series of motions *in limine*.

23 See Exhibit A.

24 //

25 //

26 //

27 //

#### **IV. ASSET FORFEITURE**

#### A. Property Subject to Forfeiture

The United States intends to seek forfeiture of any firearms, and ammunition seized from Defendant, specifically:

- a Smith & Wesson .357 Magnum caliber revolver;
- a Taurus .22LR caliber revolver;
- Thirteen (13) live rounds of .357 Magnum caliber ammunition with headstamp markings “SIG 357 MAG”; and
- Six (6) live rounds of .22LR caliber ammunition with a headstamp marking “C.”

(collectively, the “Subject Property”).

The Second Superseding Indictment provided notice of the United States' intent to forfeit the Subject Property. Dkt. No. 60. All of the Subject Property is forfeitable under Title 18, United States Code, Section 924(d)(1), by way of Title 28, United States Code, Section 2461(c), as firearms and ammunition used or involved in Defendant's commission of Unlawful Possession of Firearms and Ammunition (Count 1). The United States expects the evidence will prove the factual nexus between the offense charged in Count 1 of the Second Superseding Indictment and the Subject Property.

#### **B. Legal Standard for Forfeiture**

Criminal forfeiture is a form of punishment that is imposed as part of a criminal sentence. *Libretti v. United States*, 516 U.S. 29, 39–40 (1995). For the government to criminally forfeit property, there must be a predicate criminal conviction, a statute authorizing forfeiture for the crime of conviction, and evidence to support the statutorily required nexus between the property and the crime of conviction. See e.g., *United States v. Garcia-Guizar*, 160 F.3d 511, 518–20 (9th Cir. 1998) (reviewing requirements to establish criminal forfeiture of property). With respect to the required nexus, the government must

1 establish the forfeitability of the relevant property by a *preponderance of the evidence*. *Id.*  
 2 at 517–18 (“[T]he government need prove by only preponderance of the evidence, and not  
 3 beyond a reasonable doubt, that property should be criminally forfeited.”) (citing *United*  
 4 *States v. Hernandez-Escarsega*, 886 F.2d 1560, 1576–77 (9th Cir. 1989)). In other words,  
 5 depending on the relevant forfeiture statute, the government must present evidence that  
 6 establishes the relevant property is “more likely than not” forfeitable as proceeds of the  
 7 crime, property involved in the crime, or property used, or intended to be used, to commit  
 8 or to facilitate the crime. *Id.* at 522 n.9; *see also, e.g.*, *Sanchez v. Monumental Life Ins. Co.*,  
 9 102 F.3d 398, 404 (9th Cir. 1996) (equating “preponderance” to “more likely than not”).  
 10 This lower standard of proof “is constitutional because the criminal forfeiture provision  
 11 does not itself describe a separate offense but is merely an ‘additional penalty’ for an  
 12 offense that must be proved beyond a reasonable doubt.” *Garcia-Guizar*, 160 F.3d at 518  
 13 (citing *Hernandez-Escarsega*, 886 F.2d at 1577).

14 The relevant statutes provide that forfeiture is a mandatory part of any criminal  
 15 sentence for violation of the charged offense. Under 18 U.S.C. § 924(d)(1), a defendant  
 16 must forfeit any firearms or ammunition used or involved in certain firearm possession  
 17 offenses, including Unlawful Possession of Firearms and Ammunition (Count 1), in  
 18 violation of 18 U.S.C. § 922(g)(1). Although this statute pertains to civil forfeiture,  
 19 28 U.S.C. § 2461(c) extends its applicability to criminal forfeiture.

### 20 C. Forfeiture Process

21 Rule 32.2 sets out the procedures for determining the forfeitability of property in a  
 22 criminal case. Forfeitures are decided after a guilty verdict is returned on a count that  
 23 supports the forfeiture. *See Fed. R. Crim. P.* 32.2(b)(1)(A). Then, the specific question for  
 24 the fact finder is “whether the government [has established the] requisite nexus between  
 25 the property and the offense.” *Fed. R. Crim. P.* 32.2(b)(1)(A). Either party has a right to  
 26 request the jury determine the forfeitability of specific property, such as firearms, but the  
 27 party must request that the jury be retained before the jury begins deliberating the

1 underlying offenses. Fed. R. Crim. P. 32.2(b)(5)(A). The United States is willing to waive  
 2 its right to a jury trial in that proceeding and have the Court decide the forfeitures. If,  
 3 however, Defendant requests that the jury be retained to determine the forfeitability of the  
 4 Subject Property, the United States is prepared to present the forfeiture case to the jury.  
 5 The United States is submitting proposed forfeiture jury instructions and a special  
 6 forfeiture verdict form to be used as necessary.

7 As forfeiture is determined post-conviction, and is considered part of sentencing,  
 8 the rules of evidence do not strictly apply to forfeiture proceedings. *See e.g., United State v.*  
*9 Hatfield*, 795 F. Supp. 2d 219, 229–30 (E.D.N.Y. 2011) (holding neither the Federal Rules  
 10 of Evidence nor *Daubert* apply to forfeiture hearings); *United States v. Creighton*, 52 Fed.  
 11 Appx. 31, 35–36 (9th Cir. 2002) (“[H]earsay evidence is permissible at sentencing and  
 12 does not, *per se*, lack sufficient indicia of reliability.”). The factfinder may consider any  
 13 evidence that is “relevant and reliable.” Fed. R. Crim. P. 32.2(b)(1)(B). This includes any  
 14 evidence presented by the parties during trial on the substantive criminal offenses. *See id.*  
 15 (“The court’s [or jury’s forfeiture] determination may be based on evidence already in the  
 16 record. . . .”); *see also United States v. Newman*, 659 F.3d 1235, 1244–45 (9th Cir. 2011)  
 17 (same).

18 In the forfeiture proceeding, the United States expects to rely primarily on the  
 19 testimony and other evidence introduced during the guilt/innocence phase of trial. The  
 20 United States expects testimony and related exhibits presented in its case-in-chief will  
 21 establish that the Subject Property was involved in the firearm offense set forth in Count 1.  
 22 The United States expects to present argument with respect to the forfeiture of the Subject  
 23 Property, but it does not anticipate presenting substantial additional testimony or exhibits.  
 24 The United States reserves its right, however, to offer additional evidence in support of  
 25 forfeiture, and to take different positions with respect to forfeiture, as necessary to respond  
 26 to developments at trial.

27 //

## V. CONCLUSION

The government is not aware of other legal issues that are likely to arise during the course of this trial. If other issues do arise, the government will address those issues by way of a supplemental brief.

DATED: September 11<sup>th</sup>, 2023.

Respectfully submitted,

TESSA M. GORMAN  
Acting United States Attorney

*s/ Stephen Hobbs*  
\_\_\_\_\_  
STEPHEN HOBBS  
RACHEL YEMINI  
Assistant United States Attorneys  
United States Attorney's Office  
700 Stewart Street, Suite 5220  
Seattle, Washington 98101-1271  
Telephone: (206) 553-4301  
Email: stephen.p.hobbs@usdoj.gov